

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BESARO MOBILE HOME PARK, LLC,

Plaintiff,

v.

CITY OF FREMONT,

Defendant.

No. C 05-2886 CW

ORDER DENYING
PLAINTIFF'S
MOTION FOR NEW
TRIAL, TO ALTER
OR AMEND JUDGMENT
AND FOR RELIEF
FROM ADVERSE
JUDGMENT

Plaintiff Besaro Mobile Home Park moves pursuant to Rules 59 and 60 for a new trial, to alter or amend the judgment or for relief from an adverse judgment. Defendant City of Fremont opposes the motion. The matter is decided on the papers and the hearing set for December 8, 2006 is VACATED. Having considered all of the papers filed by the parties, the Court DENIES Plaintiff's motion.

BACKGROUND

As discussed in the Court's previous orders, Plaintiff Besaro is the owner of a mobile home park in Fremont. This controversy arises out of Ordinance No. 2390, which amended Fremont's rent

1 control law. On December 16, 2005, Plaintiff filed its first
2 amended complaint (FAC), alleging claims against Fremont for: (1)
3 taking property "without payment of just compensation and/or due
4 process of law" in violation of the Fifth and Fourteenth Amendments
5 of the United States Constitution and 42 U.S.C. § 1983; (2) taking
6 property in violation of the California Constitution; and (3)
7 declaratory relief.

8 The Court dismissed the FAC, finding (1) that an as-applied
9 challenge under the Takings Clause was not ripe due to failure to
10 exhaust State remedies; (2) that the federal substantive due
11 process claim was not properly plead because it alleges a claim
12 that can be analyzed under the Takings Clause; (3) that any facial
13 challenge stated a cause of action that accrued when the vacancy
14 control ordinance was originally passed in 1992 and thus was barred
15 by the statute of limitations; and (4) that Besaro's allegations of
16 the lack of a valid purpose to support its Takings Clause claims
17 were conclusory and failed to state a claim.

18 The Court granted Besaro leave to amend its complaint,
19 instructing (1) that it could file an as-applied challenge to the
20 ordinance once it is exhausted; (2) that it could replead a
21 substantive due process claim if it could allege a claim that could
22 not be analyzed under the Takings Clause or another explicit
23 constitutional provision; (3) that it could replead its facial
24 challenge if it could allege a Takings Clause claim that accrued as
25 a result of the 2000 enactment of Ordinance No. 2390; and (4) that
26 it could replead the lack of public purpose claim if it could make
27 non-conclusory allegations to support its claim.

1 Besaro filed its second amended complaint (SAC) on July 19,
2 2006, alleging the same three claims. However, Besaro amended its
3 § 1983 claim to clarify that it did not "allege a taking under the
4 just compensation clause of the Fifth Amendment." SAC ¶ 41.
5 Rather, Besaro claimed that Ordinance No. 2390 (1) constitutes a
6 "taking of [its] property without a valid public purpose and/or
7 without due process of law;" (2) constitutes a taking in violation
8 of the California Constitution; and (3) is "invalid and
9 unenforceable, both on its face and as applied [because it]
10 violate[s] rights guaranteed to Plaintiff under the federal and/or
11 state constitutions . . . including the right to rents that reflect
12 'general market conditions.'" SAC ¶¶ 41, 60.

13 Fremont again moved to dismiss the complaint pursuant to Rule
14 12(b)(1), arguing that if Besaro was alleging a facial challenge it
15 was time-barred and if it was alleging an as-applied challenge it
16 was unripe, and Rule 12(b)(6), arguing that any claim, even if
17 properly before the Court, failed to state a claim.

18 On October 19, 2006, the Court granted with prejudice
19 Fremont's motion to dismiss the SAC. Plaintiff now argues that it
20 is entitled to Relief under Rules 59 and 60 and challenges two of
21 the Court's findings in that order: (1) that a Takings Clause
22 challenge based on the absence of a valid public purpose is a
23 facial challenge and (2) that Plaintiff does not have a
24 constitutional right to raise rents to reflect "general market
25 conditions."
26
27
28

LEGAL STANDARD

I. Rule 59(e)

The Ninth Circuit has instructed that amendment or alteration is appropriate under Federal Rule of Civil Procedure 59(e) "if (1) the district court is presented with newly discovered evidence, (2) the district court committed clear error or made an initial decision that was manifestly unjust, or (3) there is an intervening change in controlling law." Zimmerman v. City of Oakland, 255 F.3d 734, 740 (9th Cir. 2001).

II. Rule 60

Rule 60(b) enumerates the grounds upon which a motion for relief from an order or judgment may be made. It specifies the following:

- 1) mistake, inadvertence, surprise or excusable neglect;
- 2) newly discovered evidence which by due diligence could not have been discovered before the court's decision;
- 3) fraud by the adverse party;
- 4) the judgment is void;
- 5) the judgment has been satisfied; or
- 6) any other reason justifying relief.

Fed. R. Civ. P. 60(b).

Here, Besaro moves for relief from final judgment on the first ground, alleging that its "failure to file a request for judicial notice in response to the statements in the City's reply brief before October 19, 2006 was due to surprise, mistake or excusable neglect" because the Court issued its order before the scheduled hearing date. Plaintiff's Motion at 4.

DISCUSSION

I. New Trial or Alteration or Amendment of the Judgment

Besaro first argues that it is entitled to a new trial or for

1 alteration or amendment of the judgment based on the Court's
2 misunderstanding of its claims. Besaro argues that, although it
3 clearly alleges in its complaint that "impermissible conduct under
4 the public purpose clause and/or the due process clause may be
5 challenged either on its face, or as applied," the Court
6 misinterpreted its claim as only a facial challenge. SAC ¶ 42.

7 However, the Court acknowledged Besaro's allegation that its
8 public purpose clause challenge could be brought as an as-applied
9 or facial challenge but found that any claim based on the lack of a
10 valid public purpose is a facial challenge. This decision was
11 based in part on Besaro's inability to support its argument that a
12 public purpose clause challenge is an as-applied challenge.
13 Moreover, a public purpose clause challenge is by definition a
14 facial challenge. If, as Plaintiff alleges, the statute lacks a
15 valid public purpose, its enforcement will always be
16 unconstitutional, regardless of how it is applied or how much
17 compensation the government offers. See Black's Law Dictionary 244
18 (8th Ed. 2004) (defining "facial challenge" as "A claim that a
19 statute is unconstitutional on its face -- that is, that it always
20 operates unconstitutionally.").

21 The Court did not misinterpret Besaro's claim. Rather, as it
22 stated in the order dismissing original complaint, "[i]n the
23 interest of judicial efficiency . . . the Court [assumed] that
24 Besaro intended to bring only a facial challenge to the Ordinance,
25 and [did] not require Besaro to amend its pleadings to clarify that
26 issue." July 10, 2006 Order Granting Defendant's Motion to Dismiss
27 at 7-8. Further Besaro's claim that the Court did not rule on its
28

1 as-applied challenge is incorrect. As the Court stated in its July
2 10, 2006 order dismissing the original complaint, "to the extent
3 Besaro is seeking to bring an as-applied challenge to the
4 Ordinance, that claim is dismissed without prejudice to refiling
5 once it is ripe for review." July 10, 2006 Order at 9.

6 The Court denies Besaro's motion for a new trial or to alter
7 or amend the judgment pursuant to Rule 59(e).

8 II. Relief from the Judgment

9 Besaro also argues that it is entitled to relief from the
10 judgment under Rule 60, because it intended to file a request for
11 judicial notice including evidence it alleges proves that it has a
12 constitutional right to raise rents to "general market conditions."
13 Besaro alleges that it failed to do so "due to surprise, mistake or
14 excusable neglect" when the Court decided the motion to dismiss on
15 the papers and filed its order before the scheduled hearing date.

16 Besaro cites Rule 201's provision that "Judicial notice may be
17 taken at any stage of the proceeding" in support of its argument
18 that it is entitled to relief under Rule 60. Fed. R. Evid. 201(f).
19 This provision allows the Court to consider a request for judicial
20 notice at any time during a proceeding, but does not excuse
21 Besaro's failure to file its evidence in opposition to Defendant's
22 motion to dismiss. The Court did not grant Defendant's motion to
23 dismiss until after all of scheduled papers and supporting
24 documents were filed. Therefore, the Court finds that Besaro is
25 not entitled to relief under Rule 60.

CONCLUSION

For the foregoing reasons, Besaro's motion for a new trial, to alter or amend the judgment and for relief from an adverse judgment is DENIED (Docket No. 39). Besaro's request for judicial notice is denied as moot.

IT IS SO ORDERED.

12/20/06

Dated: _____



CLAUDIA WILKEN
UNITED STATES DISTRICT JUDGE